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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-732

ALABAMA,

PETITIONER-APPELLEE,

vs.

WALLACE H. BONNER,

RESPONDENT-APPELLANT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The respondent agrees with the rendition of the Statement of the Case as stated in the brief of the petitioner-appellee but disagrees with the statement that the Eleventh Circuit incorrectly reversed the district court's decision. The Eleventh Circuit correctly ruled that the district court applied the wrong standard and correctly reversed and remanded for issuance of the writ of habeas corpus. The Eleventh Circuit ruled that the trial court's error in revealing Respondent's habitual offender status to the jury prior to deliberations resulted in actual prejudice.

THE Respondent-APPELLANT IS INCARCERATED.

STATEMENT OF THE FACTS

The respondent agrees with the rendition of the facts pertinent to the issues in this case which are contained in the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

At the trial court level, there was improper disclosure to the jury by the trial court of the respondent's habitual offender status prior to obtaining a proper verdict.

The introduction of extrinsic evidence by the Trial Judge before a proper verdict was rendered was prejudicial to respondent's rights. However, the District Court erred by finding that the error was harmless beyond a reasonable doubt under the standard enunciated in Chapman v. California. The Appeals Court applied the standard in Kotteakos v. United States, which considered the question of substantial injurious effect or influence on the jury's verdict, rather than whether given all the other evidence, the verdict would have been the same. The Appeals Court properly found that the error caused actual prejudice to the Respondent under Kotteakos.

Granting certiorari is unnecessary because the Court of Appeals based its decision on the "highly unusual facts in this case" and "by [the] compelling evidence that the error did influence the outcome of this case." Bonner v. Holt, 26 F.3d 1081, 1083 (11th Cir. 1994). Though the Court of Appeals addressed burden of proof, the Court makes it clear from n. 4 by citing to a similar fact situation decided by the Ninth Circuit, where that Court placed the burden of proof on the petitioner, that regardless of the burden, the defendants were likewise prejudiced. Therefore burden of proof was not the determining factor in the Court of Appeal's decision.

ARGUMENT

REASONS FOR DENIAL OF WRIT OF CERTIORARI

I. Whether the Court of Appeals erred by placing the burden of proof on the state rather than Respondent to show substantial and injurious effect or influence in determining the jury's verdict under Brecht v. Abrahamson, ___ U.S.___, 113 S.Ct. 1710, 123 L.Ed. 2nd 353 (1993).

A. The Court of Appeals decision was based on the "highly unusual facts in this case," and "by compelling evidence that the error did influence the outcome of this case." Bonner v. Holt, 26 F.3d 1081 (11 Cir. 1994).

The burden of proof was not the determining factor in the Court of Appeal's decision. The Court of Appeals relied on the Kotteakos harmless error standard and therefore concentrated on the effect the premature disclosure of the defendant's status as an habitual offender had on the jury. After presentation of the evidence, the jury deliberated and the foreperson pronounced a verdict of guilty; whereupon the trial court asked whether the defendant had prior convictions. The prosecutor answered in the affirmative, just as the defense attorney asked that the jury be polled. It was discovered at that point that the verdict was not unanimous. A second deliberation resulted in an unanimous verdict of guilty.

The Court of Appeals looked at the two sets of deliberations, the first prior to the disclosure when there was no unanimous

verdict, and the second after the disclosure, which resulted in an unanimous guilty verdict. The only difference in the two deliberations, was the disclosure of the defendant's habitual offender status. Therefore, the only conclusion under Kotteakos is that the disclosure did influence the result.

The Court of Appeals correctly found under Kotteakos that upon review it was proper to "speculate on the effect that an error had on the jury's decision." Bonner, 1084. The question the Court of Appeals asked was whether the resulting verdict would have been different had the jurors not been exposed to the premature disclosure of Bonner's habitual offender status. The Court of Appeals found that no verdict was reached until after the premature disclosure, at which time a guilty verdict was rendered. The only conclusion under Kotteakos was that there was actual prejudice in the form of "substantial and injurious effect or influence in determining the jury's verdict" by disclosing Bonner's habitual offender status before the guilty verdict was reached. Bonner, 1084.

The Court of Appeals analyzed the issue of burden of proof and found that it properly rested with the State of Alabama. Bonner v. Holt, 26 F.3rd 1080, 1083 (11th Cir. 1994). Such a determination, however, had no effect on their ultimate decision regarding whether actual prejudice occurred. This is obvious in the Court of Appeal's holding, wherein the Court cites to a similar case in which the 9th Circuit placed the burden of proof on the Petitioner. Bonner, n. 4. The errors complained of in these two cases are

identical in that prior convictions were improperly disclosed to the juries. Regardless of whether the state or the habeas Petitioner has the burden of proof of showing actual prejudice, reversible error is reached under Kotteakos in both cases.

Clearly, the Court's decision was based on the overwhelmingly strong evidence of error which influenced the jury's verdict not upon a misinterpretation of the law as to which party is the bearer of the burden of proof. The Petitioner is mistaken when it argues that this case turns on which party has the burden of demonstrating error. The egregious harm done by allowing the extrinsic evidence of the habitual offender's status to be heard by the jury prior to its verdict, rises to such a level that it functionally reduces the question as to who bears the burden of proof to a nullity.

The reason for granting certiorari in O'Neal v. Morris, 3 F. 3d 143 (6th Cir. 1993), cert. granted, ___U.S.___, 114 S.Ct. 1396, 128 L.Ed. 2d 70 (1994), is to resolve the inconsistent decisions in the Circuits regarding who bears the burden of proof in demonstrating prejudice. The holding in Bonner does not rest on the burden of proof, therefore, there is no reason to include Bonner in this review.

Even if this Court were to determine that the burden does indeed rest with a petitioner in habeas proceedings, a shift of the burden in the Bonner case would not change the Court of Appeals' decision. The Court of Appeals obviously attempted to dispel any argument that the Bonner decision relied on the issue of burden of proof by pointing out, that despite the Ninth Circuit's

interpretation of Kotteakos that the burden of demonstrating prejudice rests with the petitioner, both Circuits, when faced with similar facts, came to the same conclusion - error existed. The errors complained of in both Bonner and the case cited at n. 4, Jeffries v. Blodgett, 5 F.3rd 1180, 1190-91 (9th Cir. 1993), are so completely prejudicial as to override any issue of burden of proof.

ARGUMENT

II. Whether the trial court improperly disclosed to the jury prior to the polling which revealed that the verdict was not unanimous, that the respondent was an habitual felony offender.

A. Premature Disclosure To The Jury Prior To Polling Of The Fact That The Appellant Was An Habitual Offender Was Prejudicial Under The Harmless Error Analysis Of Kotteakos

Prior to the ruling in Brecht, the harmless beyond a reasonable doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), had been followed. However, in Brecht. v. Abrahamson, this Honorable Court decided that the Kotteakos standard was more appropriate for habeas cases.

The court in Brecht stated that under the Kotteakos test, the reviewing court should consider whether the error complained of "had substantial injurious effect or influence in determining the jury's verdict." Brecht quoting Kotteakos, 113 S.Ct. 1710 at 1718. In Brecht, the court reiterated that the reviewing court should review the record de novo to ascertain what effect the error complained of might have had on the substantial rights of the defendant.

In this case, even the Magistrate Judge in his Report and Recommendations to the Court, assumed that the evidence prejudiced the appellant since it was evidence of prior crimes. (R1-23-21.)

The District Court found that the disclosure to the jury that respondent was an habitual offender did not result in the guilty verdict and, therefore, did not prejudice him.

Respondent contends, however, that in determining this, the District Judge did what the court in Kotteakos cautioned against. The District Court scrutinized the impact of the disclosure in light of the evidence of guilt. The Court substituted its own reaction to the evidence, without properly weighing the impact the disclosure of prior convictions had on the jurors' minds.

Justice Rutledge, writing for the court in Kotteakos, wrote that the question is not:

> Were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had, or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done on the minds of other men, not on one's own (emphasis added), in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge other's reactions, not by his own (emphasis added), but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710 (1993) at 1724 (Stevens, J., concurring) quoting Kotteakos.

After the first set of jury deliberations (R1-28-7), the statement made by the trial court was, "is the defendant a habitual offender?", whereupon the prosecutor answered, "Yes." The District

Judge found that "the error was unimportant in relation to everything else the jury considered in the issue of the respondent's guilt or innocence, and that the error complained of was in fact harmless." (R1-28-8.)

The District Court considered whether the jury would have convicted even if the error had not taken place and in effect reached its own verdict. Respondent asserts that this inquiry does not follow the harmless error standard of Kotteakos. The Court of Appeals correctly applied the Kotteakos standard in finding that the disclosure of prior offender status did cause actual prejudice to the respondent by influencing the lone hold out juror to go along with the guilty verdict. The injurious effect of the error was substantial. The evidence was admitted in error; the verdict was rendered only after that error occurred and as a result of that error the verdict was guilty. The Court of Appeals correctly found that the prejudice affected the verdict and, therefore, the verdict was due to be reversed.

CONCLUSION

The Court of Appeals' decision, based on the harmless error analysis of Kotteakos, rested on the unusual facts and compelling evidence of substantial and injurious effect and influence that the premature disclosure of Bonner's habitual offender status had on the jury's verdict. The facts are so egregious that the resulting error is present regardless of which party has the burden of proving prejudice. Therefore, the decision in Bonner is correct and does not warrant review by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1995, I served a copy of the foregoing on the Deputy Attorney General, Gilda Branch Williams, Office of the Attorney General, Criminal Appeals Division, Alabama State House, 11 South Union Street, Montgomery, Alabama, 36130, by placing same in the United States Mail, first class, postage prepaid.

MARGARET A. STONE, ESQ.